

Memorandum

From: Paul J. Hofer, J.D. Ph.D., Policy Analyst, Federal Public and Community Defenders
Regarding: Estimate of Sentencing Effects of Holder Memo on Drug Mandatory Minimums
Date: September 9, 2013; Revised, September 17, 2013

Attorney General Eric Holder issued a memo on August 12, 2013, directing that “prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence” if the defendant meets each of several listed criteria. While more than 25,000 defendants were sentenced in FY2012 under the drug trafficking guidelines, and 15,509 were convicted under statutes carrying a minimum term of imprisonment, the best available data suggests that **just over 500 of these defendants might have received a lower sentence if the Holder memo had been issued in FY2012 and had been fully implemented by line prosecutors.**

To estimate the number of defendants likely to benefit from these new policies, the U.S. Sentencing Commission’s Monitoring Datafile for FY2012 was queried to determine how many of last year’s drug defendants appear to fit the memo’s major criteria, and how many of these did not already receive relief from any applicable mandatory penalty through the current “safety valve” or government motions to reduce sentences to reward defendants’ substantial assistance. To ensure comparability with analyses of other proposed legislation and policy changes, only cases in which the Commission received full documentation were included. Alternative analysis showed that including cases with missing documentation would increase the estimate of the number of offenders affected by only six defendants.

The memo’s criteria, and the data available to assess eligibility, are as follows:

- The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;

Defendants who received the guideline adjustment under §2D1.1(b)(2) for use of violence or threats of violence were excluded. Defendants who received either the adjustment under (b)(1), or a statutory enhancement under 18 U.S.C. §924(c), for possession of a weapon were excluded. Defendants with a BOL of 43 due to death or serious bodily injury were excluded, although some other offenses involving death or serious bodily injury could not be identified. Offenses that involved trafficking of drugs “to or with minors” could not be identified, because §2D1.1(b)(14) combines this with other conduct. However, the total number of offenders who received an adjustment under (b)(14) is small (67 or .6% of those sentenced under the 2011 *Guidelines Manual*).

- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;

Defendants who received an aggravating role adjustment under §3B1.1 were excluded.

- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels;

It is not possible to determine which defendants might be deemed to fail this somewhat subjective criterion.

- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

Defendants with three or more criminal history points were excluded.

While 6,780 defendants convicted under drug statutes carrying a mandatory minimum penalty appeared to meet the memo’s measurable criteria, most of these already receive some form of relief from the mandatory minimum penalties. As shown in the table, 868 of the 6,780 defendants did not already qualify for relief from the penalty in FY 2012. However, not all of these defendants are likely to have benefitted from the Holder memo, because the drug statutory minimum did not control their sentences; they were sentenced according to the sentencing guidelines, which are not affected by the Holder memo.

Type of Relief, If Any, From Drug Mandatory Minimums

	Frequency	Percent
No relief from MM	868	12.8
Received 5K1.1 ONLY	218	3.2
Received Safety Valve ONLY	4281	63.1
Received BOTH 5K Safety	1413	20.8
Total	6780	100.0

Among the 868 defendants, 401 had drug statutory minimums that were higher than the otherwise applicable guideline minimums. It seems likely that defendants such as these would begin to receive lower sentences if prosecutors did not charge quantity, because the statutory floor would be removed and would no longer “trump,” or override, the guideline minimum. (Under guideline rules §5G1.1 and 2, any statutory minimum greater than the otherwise applicable guideline minimum becomes the “guideline sentence.”) In addition, 467 of the 868 defendants had statutory minimums *lower* than the guideline minimum, and were thus already eligible for below-range departures or variances. But only 218 of these 467 defendants received a below-range sentence, and only 129 received a sentence at the statutory minimum—the lowest sentence possible prior to the memo. It seems likely that these defendants would receive greater reductions if the statutory floor were removed. On the other hand, it seems unlikely that judges who did not previously sentence below the guideline range, or did not impose sentences as low as the statutes would permit, will impose lower sentences if prosecutors decline to charge quantity and the statutory floor is removed.

In sum, **401 defendants** in FY2012 would have received lower guideline minimums if the memo had been in effect and was fully implemented by line prosecutors. These defendants would also have been newly eligible for downward departures or variances. An additional **129 defendants** had statutory minimums lower than the guideline range, and received the maximum downward departure or variance possible prior to the memo; these defendants seem likely to have received greater reductions if the limitation on judicial discretion were removed. Adding these groups together, the best estimate is that **530 defendants** would likely have received a lower sentence if the Holder memo had been in effect in FY2012.